SUPREME COURT, U.S.

SEP 21 19

MICHAEL RODAK, JR.,

IN THE

SUPREME COURT OF THE UNITED STATES

No. 73-525

PETER KENNETH CUEVAS,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

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IN THE

SUPREME COURT OF THE UNITED STATES

No.

PETER KENNETH CUEVAS,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

Petitioner, Peter Kenneth Cuevas, prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of the State of Florida dated May 16, 1973, in the above cause which became final on July 25, 1973, when a timely petition for rehearing was denied.

OPINION BELOW

The Felony Court of Record of Volusia County, Florida, entered an order on April 25, 1972, printed herein on page 3a, Appendix A, denying a motion to dismiss the Information, which charged the petitioner with a violation of a Florida Statute. The order specifically found the State Statute relied upon by the State of

Florida to not be violative of the Constitution of the United States and the State of Florida. A final judgment was thereafter entered on October 3, 1972, adjudging petitioner guilty of violating the Statute in question.

The Supreme Court of Florida, with one dissenting opinion, rendered its majority decision on May 16, 1973, sustaining the judgment and decision of the trial court, and same became final on July 25, 1973, when a timely petition for rehearing was denied. The decision is reported in 279 So.2d 817 and is printed herein at pages 1b, Appendix B. .

STATEMENT OF JURISDICTION

The Supreme Court of Florida affirmed the judgment of the trial court by determining, contrary to petitioner's contention, that Chapter 71-107, Laws of Florida 1971, and published as 1971 Florida Statutes 404.01 (12) and 404.02 (4), was valid and not in violation of the due process clause of the Constitution of the United States of America nor in violation of the Declaration of Rights of the Constitution of the State of Florida or any provision thereof. The Statute had been challenged as being unconstitutional on account of vagueness as applied to cannabis.

The petition for Writ of Certiorari is filed within 90 days of the decision of the Supreme Court of Florida which became final on July 25, 1973, when an order denying a timely petition for rehearing was entered.

The effect of the judgment was stayed by order entered July 25, 1973, which stay was to continue to and including August 24, 1973, to enable petitioner to seek review in the Supreme Court of the United States and obtain any further stay from said court.

The jurisdiction of this Court is invoked under 28 U.S.C., Section 1257 (3), by virtue of a State Statute

having been drawn in question on the ground of its being repugnant to the Constitution of the United States and the individual rights preserved by it.

QUESTIONS PRESENTED

The Federal questions presented for review are as follows:

Point I

Does a State Statute which seeks to prohibit conduct that is Malum Prohibitum, and does so only by inference and not by express prohibition, violate the Constitution of the United States because of vagueness?

Point II

Can the initial interpretation of a vague State Statute which does not clearly prohibit the conduct sought to be controlled be enlarged judicially to establish appropriate definiteness without violating the Constitution of the United States when applied retroactively?

CONSTITUTIONAL PROVISIONS INVOLVED

Article I, Section 10

"No State shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make anything but gold and silver coin a tender in payment of debts; pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts, or grant any title of nobility."

Fifth Amendment

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Fourteenth Amendment

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privilege or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATE STATUTE INVOLVED

Portions of Chapter 71-107, Laws of Florida 1971, are the subject of this petition. Chapter 71-107 is set forth in its entirety at page 1c, Appendix C. The specific provisions of the Statute are published as F.S.A. 404.01 (12) and 404.02 (4), which provide as follows:

"404.01 Definitions
"For the purposes of this chapter: . . .
"(12) The word 'cannabis' means all parts of the

> . . . plant cannabis sativa, L., whether growing or not; the seeds thereof; the resin extracted from any part of such plant; and every compound, manufacture, salt derivative, mixture, or preparation of such plant, its seeds, or resin; but shall not include the mature stalks, of such plant, fiber produced from such stalks, oil or cake made from the seeds of such plant, any other compound, manufacture, salt, derivative, mixture, or preparation of such mature stalks (except the resin extracted therefrom), fiber, oil, or cake, or the sterilized seed of such plant, which is incapable of germination."
>
> "404.02 Prohibited Acts
> "The following shall be unlawful:-
> "(4) The actual or constructive possession or control of a barbiturate or a central nervous system stimulant or other drug controlled by this law by any person unless such person obtained such drug on the written prescription of a practitioner or unless such person obtained such drug by direct delivery from a practitioner for bona fide medical use, and except as provided in section 404.04, Florida Statutes."

STATEMENT OF THE CASE

Petitioner was charged by Information (page 1a, Appendix A) in the Felony Court of Volusia County, Florida, that on January 11, 1972, he

> "did then and there unlawfully have in his possession or under his control cannabis, in a quantity exceeding five (5) grams; F.S. 404.02 (4) and 404.01 (12) contrary to Florida Statute . . . 404.02 (4) and 404.01 (12) . . ."

Petitioner filed a motion to dismiss the Information (page 2a, Appendix A) alleging as grounds the unconstitutional vagueness of Chapter 404, Florida Statutes, as

applied to cannabis, in violation of petitioner's constitutional right of due process under the Laws of the United States of America and the State of Florida. The motion was denied by order of the trial court (page 3a, Appendix A), which held:

> In this denial the Court expressly holds among other things that Chapter 404, Florida Statutes, and the Sub-Chapters thereof are not unconstitutional on account of vagueness as applied to Cannabis, and that said Statute and the Sub-Sections thereof as applied to Cannabis is constitutional and not in violation of the due process clause of the Constitution of the United States of America nor in violation of the Declaration of Rights of the Constitution of the State of Florida or any provision thereof."

Thereafter, subject to the prior rulings of the court, petitioner entered a plea of guilty to the charge of unlawful possession of cannabis. After a pre-sentence investigation, the petitioner was found guilty of the charge and sentenced to be confined in the County Jail for a term of one (1) year with probation for three (3) years after serving four (4) months of the term (page 4a, Appendix A).

Petitioner filed a timely appeal to the Supreme Court of Florida and was released on bond. The Supreme Court of Florida entered its opinion (page 1b, Appendix B) on May 16, 1973, affirming the judgment of the trial court and specifically finding that the law in question was not unconstitutionally infirm by either State or Federal standards. The opinion became final on July 25, 1973, when a timely petition for rehearing was denied (page 12b, Appendix B). The State Court also stayed the execution of the decision until August 24, 1973, subject to petitioner's right to seek a further extension from the Supreme Court of the United States.

ARGUMENT

POINT I

DOES A STATE STATUTE WHICH SEEKS TO PROHIBIT CONDUCT THAT IS MALUM PROHIBITUM, AND DOES SO ONLY BY INFERENCE AND NOT BY EXPRESS PROHIBITION, VIOLATE THE CONSTITUTION OF THE UNITED STATES BECAUSE OF VAGUENESS?

The alleged criminal act giving rise to the charge of unlawful possession of cannabis in excess of five (5) grams, a felony, to which petitioner entered his plea of guilty subject to the prior rulings of the trial court, occurred on January 11, 1972. Chapter 404, Florida Statutes, had only the previous year been amended by the adoption of Chapter 71-107, Laws of Florida 1971 (page 1c, Appendix C). Prior to the adoption of the amendment, the possession or delivery of cannabis had been controlled by Chapter 398, Florida Statutes. See *Raines v. State* (Sup. Ct. Fla., 1969), 225 So.2d 330; *Escobio v. State* (Sup. Ct. Fla., 1953), 64 So.2d 766; *Buttler v. State* (3rd D.C.A., Fla., 1970), 238 So.2d 313; *Borras v. State* (Sup. Ct. Fla., 1969), 229 So.2d 244.

F.S.A. 398.02 (12) defined cannabis. F.S.A. 398.02 (13) declared cannabis and other things to be "narcotic drugs" in the following language:

> "(13) (a) 'Narcotic drugs' shall mean . . . cannabis and every substance neither chemically nor physically distinguishable from them, and any and all derivatives of same, and any other drug to which the narcotic laws of the United States now apply."

When Chapter 71-107 became effective it defined cannabis by taking the *definition* of cannabis as found in F.S.A. 398.02 (12) and adding it to F.S.A. 404.01 as

subsection twelve (12). It amended F.S.A. 398.02 (13) (a) to read as follows:

"(13) (a) 'Narcotic drugs' shall mean coca leaves, opium, isonipecaine, and every substance neither chemically nor physically distinguishable from them, and any and all derivatives of same, and any other drug to which the narcotic laws of the United States now apply."

Reference to cannabis was effectively removed from the definition of "narcotic drugs" in F.S.A. 398.02 (13) (a) as amended by Chapter 71-107, Laws of Florida 1971.

F.S.A. 404.02 defines the unlawful acts controlled by the Chapter. Nowhere in the Chapter is cannabis referred to. F.S.A. 404.02 (4), violation of which the petitioner was charged, prohibits

"(4) The actual or constructive possession or control of a central nervous system stimulant or other drug controlled by this law by any person unless such person obtained such drug on the written prescription of a practitioner or unless such person obtained such drug by direct delivery from a practitioner for bona fide medical use, and except as provided in Section 404.04 Florida Statutes."

The definition of central nervous system stimulant is found in F.S.A. 404.01 (2) which refers to various drugs, but not cannabis.

"(2) The words 'central nervous system stimulant' or 'central nervous system stimulants' mean amphetamine, desoxyephedrine (methamphetamine), mephentermine, pipradol, phenmetrazine, methylphenidylacetate or any of the salts of any of the foregoing."

Other than the definition of cannabis found in F.S.A. 404.01 (12), the only reference to cannabis in F.S.A.

404, as it existed at the time of the offense, is found in F.S.A. 404.15, the penalty section. The reference there, however, defines the penalty for "Any person who violates any of the provisions of this chapter . . .". The reference is an exception for possession or delivery without consideration of under five (5) grams of cannabis wherein same constitutes a misdemeanor of the first degree. In effect, the Statute *defined cannabis, failed to prohibit* the possession, sale, or delivery thereof, and *set up a misdemeanor penalty* for possession or delivery without consideration of under five (5) grams. *No penalty or prohibition was created except perhaps by inference at best for any other sale, possession, or delivery of cannabis, and no prohibition of any kind involving cannabis was established to replace the prior prohibition in F.S.A. 398, as it existed before the effective date of Chapter 71-107, Laws of Florida 1971.*

The fundamental law requires statutes which prohibit criminal conduct to be sufficiently definite in order to satisfy the due process of law requirements of State and Federal Constitutions. As stated in 21 Am. Jur.2d, "Criminal Law", Section 17:

> "The requirement that crimes be defined with appropriate definiteness, which has been referred to as a fundamental common-law concept, is now generally held to be an essential element of due process of law. Indefiniteness in federal criminal statutes has also been regarded as constitutionally objectionable, on the grounds that it deprives the defendant of the right to be informed of the nature and cause of the accusation, and that it in effect delegates to judges and juries legislative power to determine what acts shall be criminal. And a similar defect in a state criminal statute has been found incompatible with a state constitutional provision requiring that all

general laws be of uniform operation. The underlying principle is that *all are entitled to be informed as to what the state commands or forbids and no one should be required, at peril of life, liberty, or property, to speculate as to the meaning of penal statutes.* (Citing *Lanzetta v. New Jersey*, 306 U.S. 451, 83 L ed 888, 59 S Ct 618). Thus fundamental fairness requires that no man be held criminally responsible for conduct which he could not reasonably understand to be proscribed. And no obedience may be exacted to a rule or standard that is so vague and indefinite as to be really no rule or standard at all. The indefiniteness may be either as to what persons are within the scope of the act, or *as to what acts are prohibited* (Citing *United States v. Cardiff*, 344 US 174, 97 L ed 200, 73 S Ct 189; *Winters v. New York*, 333 US 507, 92 L ed 840, 68 S Ct 665 or as to what acts are excepted from the prohibition . . . .

"If on its face a statute is repugnant to the due process clause on account of vagueness, specifications of the details of the offense intended to be charged will not serve to validate it, *since it is the statute, not the accusation under it, that prescribes the rule to govern* conduct and warns against transgression . . . .

"A penal statute must set up ascertainable standards. A statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must guess as to its meaning and differ as to its application lacks the first essential of due process of law. (Citing *Champlin Refining Co. v. Corporation Com.*, 286 US 210, 76 L ed 1062, 52 S Ct 559, 86 ALR 403; *Connelly v. General Constr. Co.*, 269 US 385, 70 L ed 322, 46 S Ct 126 and other cases) . . . All that is required is that the language, when measured by common understanding

and practices, give adequate warning of the conduct proscribed and mark boundaries sufficiently distinct for judges and juries fairly to administer the law. In determining whether adequate warning is given, the court should view the statute from the standpoint of the reasonable man who might be subject to its terms.

"The constitutional requirement of definiteness is violated by a criminal statute that fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden (Citing *United States v. Harriss*, 347 US 612, 98 L ed 989, 74 S Ct 808." (Emphasis added).

In *United States of America v. L. Cohen Grocery Company*, 255 US 81, 65 L ed 516, 41 S Ct 298, 14 ALR 1045, prohibition of "unjust or unreasonable rate or charge in handling in or with any necessaries" or the exaction of "excessive prices for any necessaries" was found to be unconstitutional for lack of definite standards by which the unlawful conduct could be measured. The court held that such words were so clearly in violation of the Fifth and Sixth Amendments to the Constitution of the United States for lack of definiteness "as to render elaboration on the subject wholly unnecessary."

The Supreme Court of Florida in *State of Florida ex rel Joel N. Lee v. T. A. Buchanan* (Sup. Ct. Fla., 1966) 191 So.2d 33, applied the same principle to a Florida Statute which illegalized acceptance of compensation for placement of a child for adoption but excepted payment of reasonable charges or fees for legal services in connection with adoptions. The court held that what was a reasonable fee was too vague to withstand a constitutional challenge where the statute was invoked criminally against an attorney. Citing *United States v. Reese*, 1876, 92 US 214, 23 L ed 563, the court stated:

"It would certainly be dangerous if the Legislature could set a net large enough to catch all possible offenders and leave it to the courts to step inside and say who could be rightfully detained and who should be set at large. This would, to some extent, substitute the Judicial for the Legislative Department of the Government.

"We simply say that the statutory section in question is too vague and indeterminate to establish for guidance of attorneys as ascertainable standard of guilt."

If an act is vague for lack of standards, certainly the failure to proscribe the act itself in plain language is void, particularly where the only hint of possible criminal sanction results from inference accomplished through strained reasoning. The trial judge was of the opinion that the legislative intent when considering the statute as a whole was sufficient to sustain the law. It would be a strange standard of conduct which is created solely by inference and not by language. One court may get the inference another would not. Under such circumstances, the citizen cannot know in advance what is prohibited because courts would differ.

Clear proof of the vagueness of F.S.A. 404 as applied to cannabis at the time of the offense appears in Chapter 72-97, Laws of Florida 1972. As the result of different court interpretations concerning the matter of prohibition of possession, sale, or delivery of cannabis under Chapter 71-107, Laws of Florida 1971, the Florida Legislature adopted Chapter 72-97, Laws of Florida 1972, which became effective March 28, 1972. The preamble to the law is significant.

"WHEREAS, there has been called to the attention of the legislature that some confusion has arisen as to the scope of Chapter 404, Florida Statutes; and

"WHEREAS, said chapter has been interpreted by one lower court of record to exclude the drug cannabis but by other courts as to include same; and

"WHEREAS, this legislature, while having no doubt as to its original intent to include said drug, yet wishing to clarify the matter as to preclude any possible misunderstanding; and

"WHEREAS, this legislation is intended solely by way of clarification and explanation,

NOW, THEREFORE . . . ,"

The act proceeds to amend F.S.A. 404.01 (3) by adding to it "The words 'hallucinogenic drug' mean 'cannabis' as defined in subsection (12)" to various other specified drugs (for complete test, see page 4c, Appendix C). It is to be noted that petitioner was charged with violation of F.S.A. 404.02 (4), which prohibits possession of barbiturates or central nervous system stimulants which are defined in F.S.A. 404.01 (1) and F.S.A. 404.01 (2).

Whether one construes the law as unconstitutional as applied to cannabis or considers the law non-prohibitive at the time of the offense, one thing is clear, *even the legislature never considered cannabis as a barbiturate or central nervous system stimulant as defined at that time in F.S.A. 404.*

POINT II

CAN THE INITIAL INTERPRETATION OF A VAGUE STATE STATUTE WHICH DOES NOT CLEARLY PROHIBIT THE CONDUCT SOUGHT TO BE CONTROLLED BE ENLARGED JUDICIALLY TO ESTABLISH APPROPRIATE DEFINITENESS WITHOUT VIOLATING THE CONSTITUTION OF THE UNITED STATES WHEN APPLIED RETROACTIVELY?

The statute in effect at the time of the alleged offense defined cannabis as a "plant." It never defined cannabis as a "drug." The Supreme Court of Florida by applying the subsequent Statute adopted by the State of Florida retroactively in the nature of an *ex post facto* law to enforce a legislative intent never expressed or adopted into law at the time of the alleged offense clearly violated Article I, Section 10 of the United States Constitution.

The Supreme Court of Florida in its decision in the case at bar relied on two propositions in rendering its decision, the legislative intent found in the title and preamble to Chapter 71-107 and Chapter 72-97, Laws of Florida, and the principles enunciated in *State v. Hayles* (Sup. Ct. Fla., 1970), 240 So.2d 1.

In relying on the title and preamble to Chapter 71-107, Laws of Florida 1971, the court overlooked the failure of the Legislature to *prohibit* the possession of cannabis in words of ordinary meaning. The Legislature at no time referred to cannabis by *definition* as a drug. The ruling suggests that at any time the adoption of a law prohibiting specified conduct can be determined from the title and preamble of an Act, then the Act is sufficiently clear and effective even though the Legislature fails to enact language which itself prohibits the conduct referred to in the title or the preamble.

In relying on Chapter 72-97, Laws of Florida 1972, to determine the legislative intent in the adoption of Chapter 71-107, Laws of Florida 1971, the court overlooked the recognized ambiguity which the subsequent Act recognizes. If the original enactment was clear and unambiguous, there was no purpose to "clarify the matter." It would require only a judicial interpretation, not an amendment. To look to a subsequent legislative enactment to determine the constitutionality of a prior enactment suggests a violation of fundamental constitutional law. Even though the court recognized the prohibition against *ex post facto* legislation, the application of a subsequently adopted Act to support a criminal prosecution under a former one is at least unique, if not unconstitutional.

The court overlooked the principles enunciated in *Bouie v. Columbia*, 378 US 347, 12 L ed 2d 894, 84 S Ct 1967. In *Bouie* the Supreme Court of the United States dealt with retroactive expansion of criminal laws by judicial decree and held that such action was as constitutionally infirm as subsequently adopted legislation. As stated therein:

> "There can be no doubt that a deprivation of the right of fair warning can result not only from vague statutory language but also from an unforeseeable and retroactive judicial expansion of narrow and precise statutory language. As the Court recognized in *Pierce v. United States*, 314 US 306, 311, 86 L ed 226, 231, 62 S Ct 237, 'judicial enlargement of a criminal Act by interpretation is at war with a fundamental concept of the common law that crimes must be defined with appropriate definiteness.' Even where vague statutes are concerned, it has been pointed out that the vice in such an enactment cannot 'be cured in a given case by a construction in that very case placing valid limits on

the statute,' for 'the objection of vagueness is twofold: inadequate guidance to the individual whose conduct is regulated, and inadequate guidance to the triers of fact. The former objection could not be cured retrospectively by a ruling either of the trial court or the appellate court, though it might be cured for the future by an authoritative judicial gloss . . . .' Freund, The Supreme Court and Civil Liberties, 4 Vand L Rev 533, 541 (1951). See Amsterdam, Note, 109 U Pa L Rev 67, 73-74, n 34.

"If this view is valid in the case of a judicial construction which adds a 'clarifying gloss' to a vague statute, id., at 73, making it narrower or more definite than its language indicates, it must be a fortiori so where the construction unexpectedly broadens a statute which on its face had been definite and precise. Indeed, an unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an ex post facto law, such as Art 1 Section 10, of the Constitution forbids . . . If a state legislature is barred by the Ex Post Facto Clause from passing such a law, it must follow that a State Supreme Court is barred by the Due Process Clause from achieving precisely the same result by judicial construction. Cf. *Smith v. Cahoon*, 283 US 553, 565, 75 L ed 1264, 1273, 51 S Ct 582. The fundamental principle that 'the required criminal law must have existed when the conduct in issue occurred,' Hall, General Principles of Criminal Law (2d ed 1960), at 58-59, must apply to bar retroactive criminal prohibitions emanating from courts as well as from legislatures."

The court overlooked the fact that when the Legislature clarified its 1971 enactment with its adoption of Chapter 72-97, Laws of Florida 1972, it defined cannabis as a drug for the first time since the removal of cannabis from the control of F.S.A. 398; that at the time of the

events in the case at bar, cannabis was not defined in apt words as a drug. Cannabis is a *plant*, in fact, and by statutory definition, in the legislative enactment in question. It becomes a *drug* only when defined as such. When Chapter 72-97 was adopted, the Legislature defined cannabis as a drug by including same in the definition of an hallucinogenic drug. *This was new. It did not exist on the critical date of petitioner's alleged conduct.*

Petitioner was charged with a violation of F.S.A. 404.02(4) and 404.01(12). The 1972 amendment by the Legislature in defining cannabis as a drug added specific reference to the plant as an hallucinogenic drug in F.S.A. 404.01(3). The Legislature also amended F.S.A. 404.02(1) by adding "hallucinogenic" drug to the prohibited conduct. Although *State v. Hayles* avoids the necessity of the latter amendment in language all of us can understand, it does not apply to create a drug from a plant when the Legislature *has not* called the plant a drug. If the petitioner were charged today with the offense in question under the amendments made in 1972, he would be charged with a violation of F.S.A. 404.02(1), 404.01(3), and 404.01(12), not F.S.A. 404.02(4) and 404.01(12) as was done in the original Information. The anomaly establishes the ambiguity which the decision overlooked.

The petitioner submits that F.S.A. 404 did not apply to cannabis at the time of the offense, nor did any other law, or, if it did apply, it was so vague in regard thereto at the time of the alleged offense as to be constitutionally infirm under both State and Federal standards, and it was in violation of due process under the Fifth and Fourteenth Amendments to and Article I, Section 10 of the United States Constitution.

CONCLUSION

The Laws of Florida did not prohibit the possession of cannabis on the date the alleged offense occurred. The previously existing law which had made same unlawful had been repealed. The new law did not effectively prohibit same. The prohibition can only be found in F.S.A. 404 at the time of the alleged offense by inference and strained construction. Subsequent amendment to clarify the ambiguity demonstrates that the sections under which petitioner was charged did not prohibit the offense, and those sections which were subsequently amended cannot now be the basis to support a charge occurring before their adoption. The denial of the motion to dismiss the Information on constitutional grounds was erroneous.

It is respectfully submitted that the Supreme Court of Florida not only erroneously affirmed the judgment of the trial court but in doing so committed an infraction of the constitutional prohibition against *ex post facto* laws by judicial expansion of a vague law in an effort to reach a desired result through strained and improper reasoning, all in violation of petitioner's rights under the Constitution of the United States of America.

WHEREFORE, petitioner prays that this Honorable Court will issue a Writ of Certiorari to review the judgment and decision of the Florida Supreme Court and upon consideration of same correct the decision therein to accord with the views expressed in this Petition and

the fundamental organic law of the United States of America.

Respectfully submitted,

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APPENDIX A

IN THE FELONY COURT OF RECORD of Volusia County, State of Florida, in the year of our Lord one thousand nine hundred and seventy-two

THE STATE OF FLORIDA
vs.
PETER KENNETH CUEVAS

Information for UNLAWFUL POSSESSION OF CANNABIS

IN THE NAME AND BY THE AUTHORITY OF THE STATE OF FLORIDA: . . .

COUNT II

And for a second count of this information Stephen L. Boyles State Attorney for the 7th Judicial Circuit of the State of Florida in and for Volusia County, as prosecuting officer for the FELONY COURT OF RECORD of Volusia County, Florida, under oath, information makes that PETER KENNETH CUEVAS of the County of Volusia and the State of Florida, on the 11th day of January in the year of our Lord, one thousand nine hundred and seventy-two, in the County and State aforesaid

did then and there unlawfully have in his possession or under his control cannabis, in a quantity exceeding five (5) grams;
F.S. 404.02(4) and 404.01(12)

contrary to Florida Statute . . . 404.02(4) and 404.01(12) in such case made and provided against the peace and dignity of the State of Florida.

s/ STEPHEN L. BOYLES

State Attorney for the Seventh Judicial Circuit of Florida
Prosecuting Officer for the Felony Court of Record
of Volusia County, Florida

[Caption Omitted in Printing]

MOTION TO DISMISS INFORMATION

Comes now the Defendant, PETER KENNETH CUEVAS, by his undersigned attorneys and moves to dismiss the Information herein as to . . . COUNT II separately and severally on the following grounds separately and severally: . . .

2. That the conduct set forth in COUNT II of the Information fails to state a crime or violation of the laws of the State of Florida in that the conduct set forth therein is not prohibited by the laws of the State of Florida.

3. That Chapter 404, Florida Statutes, and particularly Chapters . . . 404.02(4) and 404.01(12) are Unconstitutional as they apply to Cannabis in that said Statute is so vague and ambiguous that a person of reasonable intelligence cannot determine that the sale, delivery, or possession of said substance constitutes a violation of the laws of the State of Florida. That on account thereof the purported offenses charged in the Information are in violation of Defendant's constitutional rights of due process under the laws of the United States of America and the State of Florida. . . .

OSSINSKY AND KROL
s/ Louis Ossinsky, Jr.
Attorneys for Defendant
411 Main Street
Daytona Beach, Florida

[Caption Omitted in Printing]

NO. 2237-C

ORDER

This cause came on to be heard in open court on Defendant's Motion to Dismiss the Information, . . . The Court having heard argument of respective counsel . . . and being fully advised in the premises, upon consideration thereof it is

ORDERED and ADJUDGED as follows:

1. That Defendant's Motion to Dismiss the Information be and same is hereby denied. In this denial the Court expressly holds among other things that Chapter 404, Florida Statutes, and the Sub-Chapters thereof are not unconstitutional on account of vagueness as applied to Cannabis, and that said Statute and the Sub-Sections thereof as applied to Cannabis is constitutional and not in violation of the due process clause of the Constitution of the United States of America nor in violation of the Declaration of Rights of the Constitution of the State of Florida or any provision thereof. . . . .

DONE and ORDERED in chambers at Deland, Florida, this 18th day of April, A. D. 1972.

s/ Uriel Blount, Jr.
Felony Court Judge

[Caption Omitted in Printing]

Case No. 2237 – Count II

JUDGMENT, SENTENCE AND ORDER PLACING DEFENDANT ON PROBATION DURING PORTION OF SENTENCE

This cause coming on this day to be heard before me, and you, the defendant, PETER KENNETH CUEVAS, being now present before me, and you having: ENTERED A PLEA OF GUILTY TO the offense of Unlawful Possession of Cannabis the court hereby adjudges you to be guilty of said offense.

It appears to the Court that the ends of justice and the welfare of society would be best served by imposing a county jail sentence upon you and by placing you on probation after you have served a portion of such sentence.

Have you any cause to show why sentence should not be pronounced upon you? You saying nothing in bar or preclusion of sentence,

It is hereby ordered and adjudged that you, for your said offense, be confined in the County Jail for a term of One (1) year; that after you have served Four (4) months of said term, without deducting therefrom any allowance for gain time, you shall be placed on probation for a period of three (3) years under the supervision of the Florida Probation and Parole Commission and its Supervisors, such supervision to be in accordance with the laws of this State; and that after you are released on probation you shall comply with the following conditions of probation:

(a) Not change the defendant's residence or employment or leave the county of residence without first procuring the consent of the Court, which

consent shall be obtained through the defendant's Probation Supervisor.

(b) Not later than the fifth day of each month, until the defendant's release, make a full and truthful report to the defendant's Probation Supervisor on the form provided for that purpose, or as otherwise directed by the Supervisor.

(c) Use no narcotic drugs; nor visit places where intoxicants or drugs are sold, dispensed, or used unlawfully; nor use intoxicants of any kind to excess.

(d) Avoid injurious or vicious habits; avoid association with persons of harmful character or bad reputation.

(e) In all respects live honorably, work diligently at a lawful occupation, and support dependents, if any, to the best of defendant's ability, and live within what income is available.

(f) Neither carry nor own any weapons without first securing the consent of the Probation Supervisor.

(g) Visit no gambling places or "juke joints."

(h) Live and remain at liberty without violating any law.

(i) Promptly and truthfully answer all inquiries directed by the Court and the Probation Supervisor; allow the Probation Supervisor to visit the home, employment site, or elsewhere, and carry out all instructions he gives.

(j) If at any time it becomes necessary to communicate with the Probation Supervisor for any purpose and he is not accessible, direct such communication to the Florida Probation and Parole Commission, Tallahassee.

(k) Pay to the Volusia County Council, DeLand, Florida, the sum of $50.00 as Court Costs of this prosecution.

It is further ordered that you shall be released from custody after you have served the above specified portion of said sentence and have been instructed as to the terms of your probation by the Probation Supervisor.

You are hereby placed on notice that the Court may at any time rescind or modify any of the conditions of your probation, or may extend the period of probation as authorized by law, or may discharge you from further supervision; and that if you violate any of the conditions of your probation, you may be arrested and the Court may revoke your probation and require you to serve the balance of said sentence.

It is furthered ordered that the Clerk of this Court file this order in his office, record the same in the Minutes of the Court, and forthwith forward three certified copies of same to the Probation Supervisor in this District for his use in compliance with the requirements of law.

DONE AND ORDERED IN OPEN COURT, this the 3rd day of October, 1972.

s/ ROBERT H. MATTHEWS
Judge

APPENDIX B

IN THE SUPREME COURT OF FLORIDA
JANUARY TERM, A.D., 1973

PETER KENNETH CUEVAS,

Appellant,

vs. CASE NO. 42,887

STATE OF FLORIDA,

Appellee.

Opinion filed May 16, 1973

An Appeal from the Felony Court of Record, in and for Volusia County, Uriel Blount, Jr., Judge

Louis Ossinsky, Jr. of Ossinsky and Krol, for Appellant

Robert L. Shevin, Attorney General; and Michael M. Corin, Assistant Attorney General, for Appellee

BOYD, J.

This cause is before us on appeal from the Felony Court of Record, Volusia County. The trial court, in its order,[1] entered upon appellant's motion to dismiss,

[1] Said order reads, in part:

"ORDERED and ADJUDGED as follows:

"1. That Defendant's Motion to Dismiss the Information be and the same is hereby denied. In this denial the Court expressly holds among other things that Chapter 404, Florida Statutes, and the Sub-Chapters thereof are not unconstitutional on account of

passed upon the validity of Sections 404.01(12) and 404.02(4), Florida Statutes, 1971, the Florida Drug Abuse Law, giving this Court jurisdiction of the direct appeal under Section 4 of Article V of the Florida Constitution.

The principal question posed herein is whether said sections are unconstitutionally vague and uncertain to the point of being violative of due process. The appellant duly sought to have the State's information, predicated on said sections, dismissed on the ground they were unconstitutionally vague and uncertain. When he was denied a dismissal by the trial court, the appellant negotiated and entered a plea of guilty to the information, but made it expressly subject to the correctness of the ruling of the trial judge on the question of the constitutionality of said sections. Consequently, we have appellate jurisdiction to review the case.

We find that Sections 404.01(12) and 404.02(4), are not unconstitutionally vague and uncertain.

On July 1, 1971, Chapter 71-107, Laws of Florida, became effective. Chapter 71-107 removed cannabis controls from Chapter 398, Florida Statutes, and placed cannabis under the control of Chapter 404, Florida Statutes. The title to Chapter 71-107 provides:

> "AN ACT relating to drug abuse; amending chapter 404, Florida Statutes, by including cannabis among substances controlled by the Florida drug abuse law; providing that the crime of possession or

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vagueness as applied to Cannabis, and that said Statute and the Sub-Sections thereof as applied to Cannabis is constitutional and not in violation of the due process clause of the Constitution of the United States of America nor in violation of the Declaration of Rights of the Constitution of the State of Florida or any provision thereof."

delivery without consideration of cannabis, on the first offense shall constitute a misdemeanor; providing for arrest upon probable cause for such crime; amending subsection (5) of section 398.10, Florida Statutes, to delete reference to cannabis therein; repealing subsection (12) of section 398.02, Florida Statutes; amending Section 398.02(13)(a), Florida Statutes, to delete reference to cannabis therein; providing an effective date."

Section 1 of Chapter 71-107 amended Section 404.01, Florida Statutes, by adding a new subsection (12) to provide the following definition of "cannabis":

"(12) The word 'cannabis' means all parts of the plant cannabis sativa, L., whether growing or not; the seeds thereof; the resin extracted from any part of such plant; and every compound, manufacture, salt derivative, mixture, or preparation of such plant, its seeds, or resin; but shall not include the mature stalks of such plant, fiber produced from such stalks, oil or cake made from the seeds of such plant, any other compound, manufacture, salt, derivative, mixture, or preparation of such mature stalks (except the resin extracted therefrom), fiber, oil, or cake, or the sterilized seed of such plant, which is incapable of germination."

Section 2A of Chapter 71-107 amended subsection (1) of Section 404.15, Florida Statutes, to provide for specificity in penalizing first offense possession or delivery without consideration of not more than five (5) grams of cannabis:

"Section 2A. Subsection (1) of section 404.15, Florida Statutes, is amended to read:

"404.15 Penalties. – Any person who violates any of the provisions of this chapter shall be punished as follows:

"(1) For a first conviction *he shall be guilty of a felony of the third degree, punishable as provided in sections 775.082, 775.083, and 775.084*; ~~by imprisonment in the state penitentiary for not more than 2 years or by a fine of not more than $1,000, or both~~; *provided that if the first offense is the possession or delivery without consideration of not more than five (5) grams of cannabis, he shall be guilty of a misdemeanor of the first degree, punishable as provided in sections 775.082 and 775.083, provided, further, that for the purposes of this subsection, the word cannabis shall not include the resin extracted from the plant cannabis sativa, L., or any compound, manufacture, salt, derivative, mixture, or preparation of such resin.*"

Section 3 of Chapter 71-107 added the following subsection to Chapter 404, Florida Statutes:

"404.021 Arrest without warrant. – Notwithstanding any provision of the laws of this state relating to arrest to the contrary, a law enforcement officer may arrest without warrant any person whom he has probable cause to believe is violating the provisions of this chapter relating to possession of cannabis."

Subsections 404.02(1) and (4), Florida Statutes, provide:

"404.02 Prohibited acts. – The following shall be unlawful:

"(1) The delivering or causing to be delivered of any barbiturate or central nervous system stimulant or other drug controlled by this chapter, except as provided in §404.04, unless:

* * *

"(4) The actual or constructive possession or control of a barbiturate, central nervous system stimulant, or other drug controlled by this chapter by any

person unless such person obtained such drug on the written prescription of a practitioner or unless such person obtained such drug by direct delivery from a practitioner for a bona fide medical use, and except as provided in §404.04."

With the foregoing in mind, two questions of material inquiry occur in light of appellant's challenge to Chapter 404, Florida Statutes:

1. Did the Legislature intend to prohibit the delivery and possession of cannabis by Section 404.02(1) and 404.02(4), Florida Statutes, supra?

2. If the answer to the first question is in the affirmative, then is the phrase"* * * or other drug controlled by this chapter * * *" of sufficient legal clarity to avoid a constitutional onslaught for vagueness?

The answer to Question 1 must be in the affirmative. To arrive at any other conclusion would be to hold that the Legislature abolished Chapter 398's controls over cannabis and left no control at all. The best evidence that the Legislature did not intend such a death knell for cannabis proscriptions is the following "whereas" language appearing in Chapter 72-97, Laws of Florida:

"WHEREAS, there has been called to the attention of the legislature that some confusion has arisen as to the scope of chapter 404, Florida Statutes; and

"WHEREAS, said chapter has been interpreted by one lower court of record to exclude the drug cannabis but by other courts as to include same; and

"WHEREAS, this legislature, while having no doubt as to its original intent to include said drug, yet wishing to clarify the matter so as to preclude any possible misunderstanding; and

"WHEREAS, this legislation is intended solely by way of clarification and explanation, NOW, THEREFORE,"

Chapter 72-97 goes on to include the definition of "cannabis" as defined by Section 404.01(12) within the definition of the words "hallucinogenic drug" as defined by Section 404.01(3). Of course, the clarification of Chapter 72-97 cannot be applied retroactively, but it is further, though not indispensable, persuasive evidence in support of the proper construction of the earlier statute.

An affirmative answer to the first question leads unerringly to *State v. Hayles*,[2] in which this Court found the phrase "or other drug controlled by this chapter":

". . . . [O]f such determinative meaning and reasonably specific and sufficient precision as to clearly advise a citizen of the conduct which is proscribed; thus the statute is not unconstitutionally vague in this case."[3]

This Court continued:

"Fla. Stat. §404.01, F.S.A., of the chapter in Definitions lists specific types of substances to which the entire Ch. 404 is to apply. These include barbiturates, central nervous system stimulants, and hallucinogenic drugs. Fla. Stat. §404.02, F.S.A., makes unlawful the delivery of barbiturates, central nervous system stimulants, or of 'any * * * other drug controlled by this chapter,' and also makes unlawful the possession of barbiturates, central nervous system stimulants, 'or other drug controlled by this law * * *.'

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[2]240 So.2d 1 (Fla. 1970).

[3]Id. at 2.

"Reading Fla. Stat. §§404.01 and 404.02, F.S.A., in conjunction, the only reasonable conclusion is that the Legislature intended to make unlawful under §404.02, the possession or delivery of substances named in §404.01."[4]

As applicable to the case at bar, when Chapter 71-107, Laws of Florida, became effective, "cannabis" was defined by Section 404.01(12) and the delivery and possession thereof were clearly proscribed by Sections 404.02(1) and 404.02(4), Florida Statutes. The intent of the Legislature was clear and constitutionally precise.

Accordingly, the judgment of the trial court is affirmed.

It is so ordered.

CARLTON, C.J., ROBERTS, ADKINS, McCAIN and DEKLE, JJ., Concur

ERVIN, J., Dissents with Opinion

ERVIN, J., dissenting:

I find that Sections 404.01(12) and 404.02(4) as applied in this case are unconstitutionally vague and uncertain.

Section 404.01(12) defines cannabis as follows:

"(12) The word 'cannabis" means all parts of the plant cannabis sativa, L., whether growing or not; the seeds thereof; the resin extracted from any part of such plant; and every compound, manufacture, salt, derivative, mixture, or preparation of such plant, its seeds, or resin; but shall not include the mature stalks of such plant, fiber produced from such stalks, oil or cake made from the seeds of such plant, and any other compound manufacture, salt,

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[4]Id. at 2-3.

derivative, mixture, or preparation of such mature stalks (except the resin extracted therefrom), fiber, oil, or cake, or cake, or the sterilized seed of such plant, which is incapable of germination.

"Nothing in subsections (1), (2) and (3) of this section shall be construed to include items commonly known as patent or proprietary preparations which are sold as over-the-counter items not requiring a prescription."

It is noted that this definition as well as Section 404.15(1), F.S., hereinafter discussed, were insertions by amendment of the 1971 Legislature (Ch. 71-107) into Chapter 404, F.S. However, in amending, the Legislature did not take the trouble to gear its amendments into Chapter 404 in apt constitutional language necessary to the validity of a criminal statute, as explained hereinafter.

Section 404.02(4) and (5) makes unlawful

"(4) The actual or constructive possession or control of a barbiturate, central nervous system stimulant, or other drug controlled by this chapter by any person unless such person obtained such drug on the written prescription of a practitioner or unless such person obtained such drug by direct delivery from a practitioner for bona fide medical use, and except as provided in §404.04.

"(5) The actual or constructive possession or control of an hallucinogenic drug by any person, except as provided in §404.04."

A fair inspection and comparison of all of the provisions of Chapter 404, F.S., and in particular Section 404.01 (definitions) and Section 404.02 (prohibited acts), does not disclose that cannabis is included in the definition of "barbiturates," "central nervous system stimulants," or "hallucinogenic drug." A cursory reading of the definitions of barbiturates, central nervous system

stimulants, and hallucinogenic drugs contained respectively in Sections 404.01(1), (2), and (3), will disclose "cannabis" is not included in any of these definitions. The words "or other drug controlled by this chapter" in the context employed must under the doctrine ejusdem generis fall within the prohibited classifications just preceding. Nowhere in Chapter 404 is cannabis described or referred to as a prohibited drug. For aught that appears in Chapter 404, cannabis may well fall into one of the excepted items therefrom.

Even the penalty section (404.15, F.S.) contains contradictory language negating any connotation that possession of cannabis as described in Section 404.01(12), F.S., is subject to criminal penalty. After stating in Section 404.15(1) that if the first offense charged is the possession or delivery of not more than five grams of cannabis, the defendant shall be guilty of a misdemeanor, this language is added:

> "... For the purposes of this subsection, the word 'cannabis' shall not include the resin extracted from the plant cannabis sativa, L., or any compound, manufacture, salt, derivative, mixture, or preparation of such resin."

This language in the penalty section imports a meaning that the word "cannabis" shall not include the resin extracted from the plant cannabis sativa, L., which, however, is expressly included in Section 404.01(12), F.S. This contradiction further contributes to the vagueness and uncertainty of the statutory language concerning "cannabis."

Unquestionably, the 1972 Legislature became cognizant of the ineptitude and uncertainty of its language relating to cannabis in Chapter 404, F.S., and attempted after the fact of its original deficient enactment to ex post facto correct the statute retroactively by including

cannabis in the definition of prohibited "hallucinogenic drugs." It made this attempt by enacting Chapter 72-97, which went into effect on March 28, 1972, well after Appellant was alleged to have violated said sections of Chapter 404 by possession of cannabis on January 11, 1972. The preamble to Chapter 72-97 is in effect a confession of legislative failure and recognition of the confusion created by the deficient language relating to cannabis in Chapter 404. The preamble reads as follows:

> "WHEREAS, there has been called to the attention of the legislature that some confusion has arisen as to the scope of chapter 404, Florida Statutes; and
>
> "WHEREAS, said chapter has been interpreted by one lower court of record to exclude the drug cannabis but by other courts as to include same; and
>
> "WHEREAS, this legislature, while having no doubt as to its original intent to include said drug, *yet wishing to clarify the matter* so as to preclude any possible misunderstanding; and
>
> "WHEREAS, this legislation is intended solely by way of clarification and explanation, NOW, THEREFORE," (Emphasis supplied.)

Not only does the Legislature recognize in its preamble to Chapter 72-97 its faulty statutory language, but it proceeds to try to rationalize it away by expressing judicially an intention contrary to a lower court's decision.

It may well be assumed that as of March 28, 1972 the Legislature has corrected to a degree the language deficiencies in Chapter 404 concerning cannabis. But its 1972 enactment can have no ex post facto or retroactive effect.

The fundamental law requires statutes which prohibit criminal conduct to be sufficiently definite in order to

satisfy due process requirements. See State v. Buchanan, Fla., 191 So.2d 33. See also, 9 Fla. Jur., *Criminal Law* §14, Requirement of certainty; §16, Protection against ex post facto laws; §21, Rule of strict construction, and 21 Am. Jur.2d, *Criminal Law*, Section 17.

I reiterate, it was not until after the enactment of Chapter 72-97 that "cannabis" was finally included by the Legislature in the category of an "hallucinogenic drug," a prohibited drug. This was an after-the-fact inclusion subsequent to Cuevas being charged with "illegal" possession of cannabis. I regret to see fundamental principles ignored, as demonstrated in this case, when statutory crimes are created by judicial implication in the precipitate frenzy for "law and order" despite constitutional safeguards that require certainty in criminal statutes and penalties and frown upon their ex post facto application.

[Caption Omitted in Printing]

IN THE SUPREME COURT OF FLORIDA
JULY TERM, A.D. 1973
WEDNESDAY, JULY 25, 1973

On consideration of the petition for rehearing filed by attorneys for appellant,

IT IS ORDERED by the Court that said petition be and the same is hereby denied.

CARLTON, C.J., ROBERTS, ADKINS, BOYD, McCAIN and DEKLE, JJ., Concur
ERVIN, J., Dissents

APPENDIX C

CONSTITUTION OF THE UNITED STATES

APPLICABLE PROVISIONS

ARTICLE I

SECTION 10. No State shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make anything but gold and silver coin a tender in payment of debts; pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts, or grant any title of nobility.

AMENDMENT V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT XIV.

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

398.02 Definitions

The following words and phrases, as used in this chapter shall have the following meanings, unless the context otherwise requires:

(1) "Physician" means a person authorized by law to practice medicine in this state and any other person authorized by law to treat sick and injured human beings in this state and to use, mix or otherwise prepare narcotic drugs in connection with such treatment, provided such person holds a valid federal narcotics tax stamp denoting payment of the special tax required by the narcotic laws of the United States.

(2) "Dentist" means a person authorized by law to practice dentistry in this state, provided such person holds a valid federal narcotics tax stamp denoting payment of the special tax required by the narcotic laws of the United States.

(3) "Veterinarian" means a person authorized by law to practice veterinary medicine in this state, provided such person holds a valid federal narcotics tax stamp denoting payment of the special tax required by the narcotic laws of the United States.

(10) "Coca leaves" includes cocaine and any compound, manufacture, salt, derivative, mixture, or preparation of coca leaves, except derivatives of coca leaves which do not contain cocaine, ecgonine, or substances from which cocaine or ecgonine may be synthesized or made.

(11) "Opium" includes morphine, codeine, and heroin, and any compound, manufacture, salt, derivative, mixture, or preparation of opium including apomorphine or any of its salts.

(12) "Cannabis" includes all parts of the plant cannabis sativa whether growing or not; the seeds thereof; the resin extracted from any part of such plant; and every compound, manufacture, salt, derivative, mixture, or preparation of such plant, its seeds, or resin; but shall not include the mature stalks of such plant, fiber produced from such stalks, oil or cake made from the seeds of such plant, any other compound manufacture, salt, derivative, mixture, or preparation of such mature stalks (except the resin extracted therefrom), fiber, oil, or cake, or the sterilized seed of such plant which is incapable of germination.

(12A) "Isonipecaine" means the substance identified chemically as "ethyl 1-methyl-4-phenylpiperidine-4-carboxylate hydrochloride" or any salt thereof by whatever trade name identified including the trade names demerol, demerol hydrochloride, meperidine, dolanthin, pethidine, dolosal, dolantal, endolat, dispadal, and dolvanol.

(13) (a) "Narcotic drugs" shall mean coca leaves, opium, isonipecaine, cannabis and every substance neither chemically nor physically distinguishable from them, and any and all derivatives of same, and any other drug to which the narcotics laws of the United States now apply.

(b) Upon the publication by the state board of health that it has, after reasonable notice and opportunity for hearing, determined that any other drug has an addiction-forming or addiction-sustaining quality similar to that of any narcotic drug as defined in paragraph (a) hereof, such determination by the board shall be prima facie evidence that such drug has the qualities so found.

(14) "Official written order" means an order written on a form provided for that purpose by the United States commissioner of narcotics, under any laws of the United States making provisions therefor, if such order forms are authorized and required by federal law, and if no order form is provided, then on an official form provided for that purpose by the state board of health.

398.03 Narcotic drugs legal only as provided in this chapter

It is unlawful for any person to manufacture, possess, have under his control, sell, prescribe, administer, dispense, or compound any narcotic drug, except as authorized in this chapter.

(The above references to Chapter 398 and Subsections thereof are shown as same existed prior to July 1, 1971)

CHAPTER 404. FLORIDA DRUG ABUSE LAW

Sec.
404.001 Short title [New].
404.015 Legislative intent [New].
404.021 Arrest without warrant [New].
404.041 Devices for injecting, smoking or using certain drugs; prohibition [New].

404.001 Short title

This chapter shall be cited and known as the "Florida drug abuse law."
Added Laws 1967, c. 67-130, § 1, eff. July 1, 1967.

Library references
Druggists ⊂⊃2.
C.J.S. Druggists §§ 2, 4.

404.01 Definitions

For the purposes of this chapter:

(1) The words "barbiturate" or "barbiturates" mean each of the salts and derivatives of barbituric acid, also known as "malonylurea," and derivatives, compounds, mixtures or preparations thereof. "Barbiturate" or "barbiturates" include hypnotic and somnifacient drugs, whether or not derivatives of barbituric acid, except that this law shall not apply to narcotics, as now or hereafter defined by the Legislature of Florida, or bromides.

(2) The words "central nervous system stimulant" or "central nervous system stimulants" mean amphetamine, desoxyephedrine (methamphetamine), mephentermine, pipradol, phenmetrazine, methylphenidylacetate or any of the salts of any of the foregoing.

(3) The words "hallucinogenic drug" mean "lysergic acid" and "lysergic acid amide," "LSD" (lysergic acid diethylamide), "DMT" (dimethyltryptamine), "peyote," "mescaline," "psilocyn," "psilocybin," including their salts and derivatives, or any compounds, mixtures and every substance neither chemically nor physically distinguishable from them, and any and all derivatives of same and any other drug to which the drug abuse laws of the United States apply, and rivea corymbosa (ololiuqui) when used as a hallucinogen.

(4) The word "delivery" means selling, dispensing, giving away, leaving with or supplying in any other manner.

(5) The word "patient" means as the case may be:

(a) The individual medically requiring a barbiturate or a central nervous system stimulant, for whom a barbiturate or central nervous system stimulant or other drug controlled by this law is prescribed or to whom a barbiturate or a central nervous system stimulant or other drug controlled by this law is administered; or

(b) The owner or the agent of the owner of an animal medically requiring a barbiturate or a central nervous system stimulant or other drug controlled by this law for which such a drug is prescribed or to which such a drug is administered.

(6) The word "person" includes individual, corporation, partnership and association.

(7) The word "practitioner" means a person authorized by law to practice medicine, osteopathic medicine, dentistry, veterinary medicine or naturopathy in this state.

(8) The word "pharmacist" means a person authorized by law to practice pharmacy in this state.

(9) The word "prescription" means an order written or signed or transmitted by word of mouth, telephone or telegraph or other means of communication issued in good faith in the course of professional practice only, by a practitioner to a pharmacist for a barbiturate, a central nervous system stimulant or other drug controlled by this law, for a particular patient, which specifies the date of its issue, the name and address of such practitioner, the name and address of the patient (and, if such barbiturate or central nervous system stimulant or other drug controlled by this law is prescribed for an animal, the species of such animal), the name and quantity of such drug prescribed, the directions for the use of such drug. The record so made shall constitute the original prescription to be filled and preserved by the pharmacist.

(10) The word "manufacturer" means a person who manufactures barbiturates and central nervous system stimulants or any other drug controlled by this law and includes persons who prepare such drugs in dosage forms by mixing, compounding, encapsulating, entableting, packaging, repackaging or other process, but does not include a pharmacist who merely packages, prepares or compounds drugs to fill prescriptions received or to be received by him from a practitioner.

(11) The word "wholesaler" means a person engaged in the business of distributing barbiturates and central nervous system stimulants or other drug controlled by this law to persons included in any of the classes named in section 404.04(2) (a)–(f), Florida Statutes.

(12) The word "cannabis" means all parts of the plant cannabis sativa, L., whether growing or not; the seeds thereof; the resin extracted from any part of such plant; and every compound, manufacture, salt derivative, mixture, or preparation of such plant, its seeds, or resin; but shall not include the mature stalks of such plant, fiber produced from such stalks, oil or cake made from the seeds of such plant, any other compound, manufacture, salt, derivative, mixture, or preparation of such mature stalks (except the resin extracted therefrom), fiber, oil, or cake, or the sterilized seed of such plant, which is incapable of germination.

Nothing in subsections (1), (2) and (3) of this section shall be construed to include items commonly known as [illegible] or proprietary [illegible] preparations which are sold as over-the-counter items not requiring a prescription.

404.015 Legislative intent

It is the intent of the legislature that all drugs controlled by the drug abuse laws of the United States, now or in the future, shall, in addition to the drugs specified by the laws of Florida, be controlled by the terms of this chapter.

Added as § 404.01(12) by Laws 1970, c. 70-44, § 1, eff. Oct. 1, 1970. Renumbered § 404.015 by the statutory revision service.

404.02 Prohibited acts

The following shall be unlawful:

(1) The delivering or causing to be delivered of any barbiturate or central nervous system stimulant or other drug controlled by this chapter, except as provided in section 404.04, Florida Statutes, unless:

(a) Such barbiturate or central nervous system stimulant is delivered by a pharmacist in good faith, upon a prescription, or an authorized refill thereof, as hereinafter provided, and there is affixed to the original container in which such drug is delivered a label bearing:

1. The name and address of the establishment from which such drug was delivered;

2. The date on which the prescription for such drug was filled;

3. The number of such prescription as filed in the prescription files of the pharmacist who filled such prescription;

4. The name of the pharmacist and his license number;

5. The name of the practitioner who prescribed such drug;

6. The name of the patient, and if such drug was prescribed for an animal a statement showing the species of the animal; and

7. The directions for the use of the drug as contained in the prescription; or

(b) Such barbiturate or central nervous system stimulant is delivered or administered by a practitioner in good faith and in the course of professional practice only, and the original container in which such drug is delivered bears a label on which appears the date of delivery, the directions for use of such drug, the name of such practitioner, the name of the patient, and if such drug is prescribed for an animal a statement showing the species of the animal.

(c) A person to whom or for whose use any drug controlled under the authority of this chapter has been prescribed, sold or dispensed by a physician, dentist, apothecary and the owner of any animal for which any such drug has been prescribed, sold or dispensed by a veterinarian, possesses it only in the container in which it was delivered to him by the person selling or dispensing same. Added Laws 1967, c. 67-136, § 3, eff. July 1, 1967.

(2) The refilling of any prescription for a barbiturate, central nervous system stimulant or other drug controlled by this act unless and to the limited extent designated on the prescription by the practitioner, or subsequently authorized by him. As amended Laws 1967, c. 67-136, § 3, eff. July 1, 1967.

(3) The delivery of a barbiturate or a central nervous system stimulant or hallucinogenic drug upon written prescription unless the pharmacist who filled such prescription files and retains it for a period of two (2) years. As amended Laws 1967, c. 67-136, § 3, eff. July 1, 1967.

(4) The actual or constructive possession or control of a barbiturate or a central nervous system stimulant or other drug controlled by this law by any person unless such person obtained such drug on the written prescription of a practitioner or unless such person obtained such drug by direct delivery from a practitioner for bona fide medical use, and except as provided in section 404.04, Florida Statutes.

(5) The actual or constructive possession or control of an hallucinogenic drug by any person, except as provided in section 404.04, Florida Statutes.

(6) The refusal to make available and to afford full opportunity to check any record, file, stock or inventory, as required by § 404.06.

(7) The failure to keep records, as required by § 404.05.

(8) The using by any person to his own advantage, or the revealing of any information required under the authority of § 404.06, concerning any method or process which, as a trade secret, is entitled to protection, except to law enforcement officers, or an officer or employee of the division of health of the department of health and rehabilitative services, or to a court when relevant in a judicial proceeding under this chapter.

(9) Obtaining or attempting to obtain a barbiturate or a central nervous system stimulant or hallucinogenic drug or procuring or attempting to procure the administration of a barbiturate or a central nervous system stimulant or hallucinogenic drug:

(10) Making a false statement in any prescription, order, report, or record referred to in this chapter.

(a) By fraud, deceit, misrepresentation or subterfuge, or

(b) By the forgery or alteration of a prescription, or

(c) By the concealment of a material fact, or

(d) By the use of a false name or the giving of a false address.

(11) Falsely assuming the title of or falsely representing any person to be a manufacturer, wholesaler, pharmacist, physician, dentist, veterinarian or other authorized person for the purpose of obtaining a barbiturate or a central nervous system stimulant or hallucinogenic drug.

(12) Making, issuing or uttering any false or forged prescription.

(13) Affixing any false or forged label to a package or receptacle containing a barbiturate or a central nervous system stimulant.

Amended by Laws 1967, c. 67-136, § 3, eff. July 1, 1967; Laws 1968, Ex.Sess., c. 68-4, § 1, eff. Feb. 27, 1968; Laws 1969, c. 69-106, §§ 19, 35, eff. July 1, 1969; Laws 1969, Ex.Sess., c. 69-1741, § 1, eff. Dec. 17, 1969.

404.15 Penalties.—Any person who violates any of the provisions of this chapter shall be punished as follows:

(1) For a first conviction he shall be guilty of a felony of the third degree, punishable as provided in §§775.082, 775.083, and 775.084; except that if the first offense is the possession or delivery without consideration of not more than five grams of cannabis, he shall be guilty of a misdemeanor of the first degree, punishable as provided in §§775.082 and 775.083. For the purposes of this subsection, the word "cannabis" shall not include the resin extracted from the plant cannabis sativa, L., or any compound, manufacture, salt, derivative, mixture, or preparation of such resin. * * *

(The above references to Chapter 404, Florida Statutes, are shown as same existed on January 11, 1972, the date of the offense)

DRUG ABUSE LAW

CHAPTER 71-107

COMMITTEE SUBSTITUTE FOR HOUSE BILLS NOS. 458 AND 501

An Act relating to drug abuse; amending chapter 404, Florida Statutes, by including cannabis among substances controlled by the Florida drug abuse law; providing that the crime of possession or delivery without consideration of cannabis, on the first offense, shall constitute a misdemeanor; providing for arrest upon probable cause for such crime; amending subsection (5) of section 398.10, Florida Statutes, to delete reference to cannabis therein; repealing subsection (12) of section 398.02, Florida Statutes; amending Section 398.02(13) (a), Florida Statutes to delete reference to cannabis therein; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Section 404.01, Florida Statutes, is amended by adding a new subsection, (12), to read:

404.01 Definitions

For the purposes of this chapter:

(12) The word "cannabis" means all parts of the plant cannabis sativa, L., whether growing or not; the seeds thereof; the resin extracted from any part of such plant; and every compound, manufacture, salt derivative, mixture, or preparation of such plant, its seeds, or resin; but shall not include the mature stalks of such plant, fiber produced from such stalks, oil or cake made from the seeds of such plant, any other compound, manufacture, salt, derivative, mixture, or preparation of such mature stalks (except the resin extracted therefrom), fiber, oil, or cake, or the sterilized seed of such plant, which is incapable of germination.

Section 2. Subsection (1) of section 404.15, Florida Statutes, is amended to read:

404.15 Penalties

Any person who violates any of the provisions of this chapter shall be punished as follows:

(1) For a first conviction, by imprisonment in the state penitentiary for not more than two (2) years or by fine of not more than one thousand dollars ($1,000), or both: provided that if the first offense is the possession or delivery without consideration of not more than five (5) grams of cannabis, punishment shall be by imprisonment in the county jail for a period not exceeding one (1) year or by fine not exceeding one thousand dollars ($1,000); provided, further, that for the purposes of this subsection, the word cannabis shall not include the resin extracted from the plant cannabis sativa, L., or any compound, manufacture, salt, derivative, mixture, or preparation of such resin.

Section 2A. Subsection (1) of section 404.15, Florida Statutes, is amended to read:

404.15 Penalties

Any person who violates any of the provisions of this chapter shall be punished as follows:

(1) For a first conviction he shall be guilty of a felony of the third degree, punishable as provided in sections 775.082, 775.083, and 775.084: provided that if the first offense is the possession or delivery without consideration of not more than five (5) grams of cannabis, he shall be guilty of a misdemeanor of the first degree, punishable as provided in sections 775.082 and 775.083, provided, further, that for the purposes of this subsection, the word cannabis shall not include the resin extracted from the plant cannabis sativa, L., or any compound, manufacture, salt, derivative, mixture, or preparation of such resin.

Section 2B. In the event HB 935, introduced in the 1971 regular session of the legislature, is enacted into law, section 2 of this act will stand repealed and be omitted from the Florida Statutes. In the event HB 935 is not enacted into law, section 2A of this act will stand repealed and be omitted from the Florida Statutes.

Section 3. Chapter 404, Florida Statutes, is amended by adding a new subsection to read:

Notwithstanding any provision of the laws of this state relating to arrest to the contrary, a law enforcement officer may arrest without warrant, any person whom he has probable cause to believe is violating the provisions of this chapter relating to possession of cannabis.

Section 4. Subsection (5) of section 398.10, Florida Statutes, is amended to read:

398.10 Records

(5) The record of narcotic drugs received shall in every case show the date of receipt, the name and address of the person from whom received, and the kind and quantity of drugs received; the kind and quantity of narcotic drugs produced or removed from process of manufacture, and the date of such production or removal from process of manufacture; and the record shall in every case show the proportion of morphine, cocaine, or ecgonine contained in or producible from crude opium or coca leaves. The record of all narcotic drugs sold, administered, dispensed, or otherwise disposed of, shall show the date of selling, administering, or dispensing, the correct name and address of the person to whom, or for whose use, or the owner and species of animal for which sold, administered, or dispensed, and the kind and quantity of drugs, such correct name and address to be signed by the person or owner (in case of an animal) to whom narcotic drugs are delivered for the use of such person or owner. Every such record shall be kept for a period of two years from the date of the transaction recorded. The keeping of a record required by or under the federal narcotic laws, containing substantially the same information as is specified above, shall constitute compliance with this section, except that every such record shall contain a detailed list of narcotic drugs lost, destroyed, or stolen, if any, the kind and quantity of such drugs, and the date of the discovering of such loss, destruction, or theft.

Section 5. Subsection (12) of section 398.02, Florida Statutes, is repealed.

Section 6. Paragraph (a) of subsection (13) of section 398.02, Florida Statutes, is amended to read:

398.02 Definitions

(13) (a) "Narcotic drugs" shall mean coca leaves, opium, isonipecaine, and every substance neither chemically nor physically distinguishable from them,

and any and all derivatives of same, and any other drug to which the narcotics laws of the United States now apply.

Section 7. This act shall take effect July 1, 1971.

Approved by the Governor June 4, 1971.

Filed in Office Secretary of State June 4, 1971.

DRUG ABUSE LAW—DEFINITIONS

CHAPTER 72-97

SENATE BILL NO. 1144

An Act relating to drug abuse; amending section 404.01(3), Florida Statutes, to include cannabis within the definition of hallucinogenic drug; amending section 404.02(1), Florida Statutes, to specifically include hallucinogenic drug in the prohibited act of delivering; providing an effective date.

WHEREAS, there has been called to the attention of the legislature that some confusion has arisen as to the scope of chapter 404, Florida Statutes; and

WHEREAS, said chapter has been interpreted by one lower court of record to exclude the drug cannabis but by other courts as to include same; and

WHEREAS, this legislature, while having no doubt as to its original intent to include said drug, yet wishing to clarify the matter so as to preclude any possible misunderstanding; and

WHEREAS, this legislation is intended solely by way of clarification and explanation, NOW, THEREFORE,

Be It Enacted by the Legislature of the State of Florida:

Section 1. Subsection (3) of section 404.01, Florida Statutes, is amended to read:

404.01 Definitions

For the purposes of this chapter:

(3) The words "hallucinogenic drug" mean "cannabis" as defined in subsection (12), "lysergic acid" and "lysergic acid amide", "LSD" (lysergic acid diethylamide), "DMT" (dimethyltryptamine), "peyote", "mescaline", "psilocyn", "psilocybin", including their salts and derivatives, or any compounds, mixtures and every substance neither chemically nor physically distinguishable from them, and any and all derivatives of same and any other drug to which the drug abuse laws of the United States apply, and rivea corymbosa (ololiuqui) when used as a hallucinogen.

Section 2. Subsection (1) of section 404.02, Florida Statutes, is amended to read:

404.02 Prohibited acts

The following shall be unlawful:

(1) The delivering or causing to be delivered of any barbiturate or central nervous system stimulant, hallucinogenic drug or other drug controlled by this chapter, except as provided in section 404.04, unless:

(a) Such barbiturate or central nervous system stimulant is delivered by a pharmacist in good faith, upon a prescription, or an authorized refill thereof, as hereinafter provided, and there is affixed to the original container in which such drug is delivered a label bearing:

1. The name and address of the establishment from which such drug was delivered;

2. The date on which the prescription for such drug was filled;

3. The number of such prescription as filed in the prescription files of the pharmacist who filled such prescription;

4. The name of the pharmacist and his license number;

5. The name of the practitioner who prescribed such drug;

6. The name of the patient, and if such drug was prescribed for an animal a statement showing the species of the animal; and

7. The directions for the use of the drug as contained in the prescription; or

(b) Such barbiturate or central nervous system stimulant is delivered or administered by a practitioner in good faith and in the course of professional practice only, and the original container in which such drug is delivered bears a label on which appears the date of delivery, the directions for use of such drug, the name of such practitioner, the name of the patient, and if such drug is prescribed for an animal a statement showing the species of the animal.

(c) A person to whom or for whose use any drug controlled under the authority of this chapter has been prescribed, sold or dispensed by a physician, dentist, apothecary and the owner of any animal for which any such drug has been prescribed, sold or dispensed by a veterinarian, possesses it only in the container in which it was delivered to him by the person selling or dispensing same.

Section 3. This act shall take effect upon becoming law.

Approved by the Governor March 28, 1972.

Filed in Office Secretary of State March 29, 1972.

CERTIFICATE OF SERVICE

I do hereby certify that a copy of the foregoing Petition and Appendix was furnished to Mr. Michael L. Corin, Assistant Attorney General, c/o Honorable Robert L. Shevin, Attorney General, The Capitol Building, Tallahassee, Florida 32304, by United States Mail, this 21st day of September, 1973.

Louis Ossinsky, Jr.
Attorney for Petitioner

SUPREME COURT, U. S.

JAN 2 1974

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1973
No. 73-525

PETER KENNETH CUEVAS,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1973
No. 73-525

PETER KENNETH CUEVAS,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

BRIEF OF RESPONDENT

OPINION BELOW

On May 16, 1973, the Supreme Court of Florida filed its opinion in Cuevas v. State, Case Number 42,887. Petitioner Cuevas filed a Petition for Rehearing which was denied on July 25, 1973; and, thus, the opinion previously filed on May 16, 1973, became final. The opinion sought to be reviewed herein is reported at 279 So.2d 817, and is printed in Petitioner's Appendix B.

JURISDICTION

Petitioner is attempting to invoke the jurisdiction of this Court pursuant to 28 U.S.C. § 1257, which, as applicable herein, provides:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> * * *
>
> "(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States. June 25, 1948, c. 646, 62 Stat. 929."
> (Emphasis supplied.)

QUESTIONS PRESENTED

I.

WHETHER CHAPTER 404, FLORIDA STATUTES, KNOWN AS THE "FLORIDA DRUG ABUSE LAW" WAS UNCONSTITUTIONALLY VAGUE AS APPLIED TO CANNABIS ON JANUARY 11, 1972?

II.

WHETHER THE JUDGMENT SOUGHT TO BE REVIEWED WAS AN UNFORESEEABLE JUDICIAL ENLARGEMENT OF A CRIMINAL STATUTE, APPLIED RETROACTIVELY, AND THUS IN VIOLATION OF CONSTITUTIONAL DUE PROCESS GUARANTEES AS ENUNCIATED IN BOUIE v. COLUMBIA, 378 U.S. 347, 12 L.Ed.2d 894, 84 S.Ct. 1697 (1964)?

STATE STATUTES INVOLVED

This case involves the provisions of Chapter 404, Florida Statutes, known as the "Florida Drug Abuse Law" as applicable to cannabis on January 11, 1972. Chapter 404, Florida Statutes, as it was in effect on January 11, 1972, is set out in its entirety herein as Respondent's Appendix A. Chapter 404, Florida Statutes, had been amended by Chapter 71-107, Laws of Florida, 1971, effective July 1, 1971. Chapter 71-107 is set forth in full in Petitioner's Appendix C, pp. 8-10. Chapter 404, Florida Statutes, was next amended by Chapter 72-97, Laws of Florida, 1972, effective March 28, 1972. Chapter 72-97 is printed in full in Petitioner's Appendix C, pp. 11-12.

ARGUMENT

I.

WHETHER CHAPTER 404, FLORIDA STATUTES, KNOWN AS THE "FLORIDA DRUG ABUSE LAW" WAS UNCONSTITUTIONALLY VAGUE AS APPLIED TO CANNABIS ON JANUARY 11, 1972?

Prior to July 1, 1971, the possession or delivery of cannabis was controlled by Chapter 398, Florida Statutes, known as the "Uniform Narcotic Drug Law". Indeed, Chapter 398, Florida Statutes, as applicable to cannabis (marijuana) had withstood a broad constitutional attack in 1969 when the Supreme Court of Florida rendered its opinion in Borras v. State, 229 So.2d 244, app.dism., 400 U.S. 808, 27 L.Ed.2d 37, 91 S.Ct. 70 (1970). In Borras, marijuana was characterized as ". . . a harmful, mind-altering drug." 229 So.2d at 246.

On July 1, 1971, Chapter 71-107, Laws of Florida, became effective. The purpose of Chapter 71-107 was to remove cannabis from the controls of Chapter 398, Florida Statutes, and to place cannabis under the control of Chapter 404, Florida Statutes. This purpose was made clear by the title

to Chapter 71-107, which provided:

> "AN ACT relating to drug abuse; amending chapter 404, Florida Statutes, by including cannabis among substances controlled by the Florida drug abuse law; providing that the crime of possession or delivery without consideration of cannabis, on the first offense, shall constitute a misdemeanor; providing for arrest upon probable cause for such crime; amending subsection (5) of section 398.10, Florida Statutes, to delete reference to cannabis therein; repealing subsection (12) of section 398.02, Florida Statutes; amending Section 398.02(13)(a), Florida Statutes to delete reference to cannabis therein; providing an effective date."

Section 1 of Chapter 71-107 amended Section 404.01, Florida Statutes, by creating a new subsection (12) to establish a definition of "cannabis". This definition was substantially identical to the definition of cannabis which had previously been found in

Section 398.02(12), Florida Statutes, and provided:

> "The word 'cannabis' means all parts of the plant cannabis sativa, L., whether growing or not; the seeds thereof; the resin extracted from any part of such plant; and every compound, manufacture, salt derivative, mixture, or preparation of such plant, its seeds, or resin; but shall not include the mature stalks of such plant, fiber produced from such stalks, oil or cake made from the seeds of such plant, any other compound, manufacture, salt, derivative, mixture, or preparation of such mature stalks (except the resin extracted therefrom), fiber, oil, or cake, or the sterilized seed of such plant, which is incapable of germination."

The penalty provision section of Chapter 404, Florida Statutes, was amended by Section 2A of Chapter 71-107 as follows:

> "Section 2A. Subsection (1) of section 404.15, Florida Statutes, is amended to read:
>
> "404.15 Penalties.--Any person who violates any of the provisions

of this chapter shall be punished as follows:

"(1) For a first conviction he shall be guilty of a felony of the third degree, punishable as provided in sections 775.082, 775.083, and 775.084; ~~by imprison ment in the state penitentiary for not more than 2 years or by a fine of not more than $1,000, or both,~~ provided that if the first offense is the possession or delivery without consideration of not more than five (5) grams of cannabis, he shall be guilty of a misdemeanor of the first degree, punishable as provided in sections 775.082 and 775.083, provided, further, that for the purposes of this subsection, the word cannabis shall not include the resin extracted from the plant cannabis sativa, L., or any compound, manufacture, salt, derivative, mixture, or preparation of such resin."

Thus, it was with no small degree of specificity that the Legislature penalized first offense possession or delivery without consideration of not more than five (5) grams of cannabis.

Finally, as applicable to Chapter 404, Florida Statutes, Section 3 of Chapter 71-107 amended Chapter 404, Florida Statutes, to create a new subsection:

> "404.021 Arrest without warrant.-- Notwithstanding any provision of the laws of this state relating to arrest to the contrary, a law enforcement officer may arrest without warrant, any person whom he has probable cause to believe is violating the provisions of this chapter relating to possession of cannabis."

The prohibited acts provisions of Chapter 404, Florida Statutes, in effect on January 11, 1972, stated:

> "(1) The delivering or causing to be delivered of any barbiturate or central nervous system stimulant or other drug controlled by this chapter, except as provided in §404.04, unless:
>
> * * *
>
> "(4) The actual or constructive possession or control of a barbiturate, central nervous system stimulant, or other drug controlled by this chapter by any person unless such person

> obtained such drug on the written prescription of a practitioner or unless such person obtained such drug by direct delivery from a practitioner for a bona fide medical use, and except as provided in §404.04." (Emphasis supplied.)

The Supreme Court of Florida reduced petitioner's vagueness challenge to Chapter 404, Florida Statutes, as applicable to cannabis, down to two questions:

> "1. Did the Legislature intend to prohibit the delivery and possession of cannabis by Sections 404.02(1) and 404.02(4), Florida Statutes, F.S.A., supra?
>
> "2. If the answer to the first question is in the affirmative, then is the phrase '* * * or other drug controlled by this chapter * * *' of sufficient legal clarity to avoid a constitutional onslaught for vagueness?"
> Cuevas, supra, page 819.

These questions were answered by the court below in the affirmative. In so deciding, it is clear that the court relied on the plain and precise language of Chapter 71-107, which amended Chapter 404, Florida Statutes, to include cannabis, and which repealed those portions of Chapter 398, Florida Statutes, that had previously controlled cannabis. Additionally, the court noted that their construction of Chapter 404, Florida Statutes, as amended by Chapter 71-107, was a proper one, and pointed to Chapter 72-97, Laws of Florida, 1972, effective March 28, 1972 (Chapter 72-97 is printed in full in Petitioner's Appendix C, pp. 11-12), and to their prior opinion in State v. Hayles, 240 So.2d 1 (Fla. 1970). The Court said:

> ". . . The best evidence that the Legislature did not intend such a death knell for cannabis proscriptions is the following 'whereas' language appearing in Chapter 72-97, Laws of Florida:
>
> "'Whereas, there has been called to the attention of the legislature that some confusion has arisen as to the scope of chapter 404, Florida Statutes; and
>
> "'Whereas, said chapter has been interpreted by one lower court of record to exclude the drug cannabis but by other courts as to include same; and

"'Whereas, this legislature, while having no doubt as to its original intent to include said drug, yet wishing to clarify the matter so as to preclude any possible misunderstanding; and

"'Whereas, this legislation is intended solely by way of clarification and explanation, Now, Therefore,'

"Chapter 72-97 goes on to include the definition of 'cannabis' as defined by Section 404.01(12) within the definition of the words 'hallucinogenic drug' as defined by Section 404.01(3). Of course, the clarification of Chapter 72-97 cannot be applied retroactively, but it is further, though not indispensable, persuasive evidence in support of the proper construction of the earlier statute.

"An affirmative answer to the first question leads unerringly to State v. Hayles, in which this Court found the phrase 'or other drug controlled by this chapter':

'. . . . [O]f such determinative meaning and reasonably specific and sufficient precision as to clearly advise a citizen of the conduct which is proscribed; thus

the statute is not unconstitutionally vague in this case.'

"This Court continued:

'Fla.Stat. § 404.01, F.S.A., of the chapter in Definitions lists specific types of substances to which the entire Ch. 404 is to apply. These include barbiturates, central nervous system stimulants, and hallucinogenic drugs. Fla.Stat. § 404.02, F.S.A., makes unlawful the delivery of barbiturates, central nervous system stimulants, or of "any * * * other drug controlled by this chapter," and also makes unlawful the possession of barbiturates, central nervous system stimulants, "or other drug controlled by this law * * *."

'Reading Fla.Stat. §§ 404.01 and 404.02, F.S.A., in conjunction, the only reasonable conclusion is that the Legislature intended to make unlawful under § 404.02, the possession or delivery of substances named in § 404.01.'

"[3] As applicable to the case at bar, when Chapter 71-107, Laws of Florida, became effective, 'cannabis' was defined by Section 404.01(12) and the delivery and possession thereof were clearly proscribed by Sections 404.02(1) and 404.02(4), Florida Statutes...." Cuevas, supra, pages 819-820.

In determining whether a penal statute statute is too vague and indefinite to meet the requirements of due process, this Court stated the following guidelines in Connally v. General Construction Co., 269 U.S. 385, 70 L.Ed.322, 46 S.Ct. 126 (1926):

> "That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law. And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law. . . . "
> Connally, supra, at 391.

In United States v. Harriss, 347 U.S. 612, 98 L.Ed. 989, 74 S.Ct. 808 (1954), the test of vagueness was worded thusly:

> "The constitutional requirement of definiteness is violated by a criminal statute that fails

> to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute. The underlying principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed."
> Harriss, supra, at 617.

Given the precise language of Chapter 71-107, and the previous construction of Chapter 404, Florida Statutes, by the Supreme Court of Florida in State v. Hayles, supra (see Wainwright v. Stone and Huffman, 42 U.S.L.W. 3267 (U.S. Nov. 5, 1973), which reaffirms the principle that federal courts must judge a state statute on a vagueness challenge in the light of prior state constructions of the statute), it is beyond question that a person of ordinary intelligence reading Chapter 404, Florida Statutes, on January 11, 1972, and its previous case construction would know that cannabis as defined by Section 404.01(12), Florida Statutes, was a drug whose delivery and possession were prohibited criminal acts as proscribed by Sections 404.02(1) and 404.02(4), Florida Statutes.

II.

WHETHER THE JUDGMENT SOUGHT TO BE REVIEWED WAS AN UNFORESEEABLE JUDICIAL ENLARGEMENT OF A CRIMINAL STATUTE, APPLIED RETROACTIVELY, AND THUS IN VIOLATION OF CONSTITUTIONAL DUE PROCESS GUARANTEES AS ENUNCIATED IN BOUIE v. COLUMBIA, 378 U.S. 347, 12 L.Ed.2d 894, 84 S.Ct. 1697 (1964)?

In Bouie v. Columbia, 378 U.S. 347, 12 L.Ed.2d 894, 84 S.Ct. 1697 (1964), the petitioners had taken seats in the restaurant department of an Eckerd's Drug Store, and awaited service. Instead of service, the petitioners were asked to leave by the store manager and the police who had been called. When the petitioners refused to leave, they were arrested and charged, inter alia, with criminal trespass in violation of Section 16-386 of the South Carolina Code of 1952 (1960 Cum. Supp.), which provided:

> ". . .'Entry on lands of another after notice prohibiting same.--Every entry upon the lands of another where any horse, mule, cow, hog or any other livestock is pastured, or any other lands of another, after

> notice from the owner or tenant prohibiting such entry, shall be a misdemeanor and be punished by a fine not to exceed one hundred dollars, or by imprisonment with hard labor on the public works of the county for not exceeding thirty days. When any owner or tenant of any lands shall post a notice in four conspicuous places on the borders of such land prohibiting entry thereon, a proof of the posting shall be deemed and taken as notice conclusive against the person making entry, as aforesaid for the purpose of trespassing'."
> Bouie, supra, at 350.

Petitioners were convicted under the trespass statute, and their convictions were affirmed by the South Carolina Supreme Court based on its construction of the statute ". . . to cover not only the act of entry on the premises of another after receiving notice not to enter, but also the act of remaining on the premises of another after receiving notice to leave." Bouie, supra, at page 350.

On certiorari, this Court reversed, agreeing with the petitioners that the construction given the statute by the

South Carolina Supreme Court in order to affirm their convictions operated to punish them for conduct that was not criminal at the time they committed it; and thus had violated the requirement of the Due Process Clause that a criminal statute give fair warning of the conduct sought to be prohibited. In so deciding the cause, this Court stated:

> ". . . Indeed, an unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an ex post facto law, such as Art I, § 10, of the Constitution forbids. An ex post facto law has been defined by this Court as one ' that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action,' or 'that aggravates a crime, or makes it greater, than it was, when committed.' Calder v. Bull, 3 Dall 386, 390, 1 L ed 648, 650. If a state legislature is barred by the Ex Post Facto Clause from passing such a law, it must follow that a State Supreme Court is barred by the Due Process Clause from achieving precisely the same result by judicial construction. Cf. Smith v. Cahoon, 283 US 553, 565, 75 L ed 1264, 1273, 51 S Ct 582. The fundamental

> principle that 'the required criminal law must have existed when the conduct in issue occurred,' Hall, General Principles of Criminal Law (2d ed 1960), at 58-59, must apply to bar retroactive criminal prohibitions emanating from courts as well as from legislatures. If a judicial construction of a criminal statute is 'unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue,' it must not be given retroactive effect. Id., at 61." (Emphasis by Court) Bouie, supra, at 353-354.

The evil done to the petitioners in Bouie by the unforeseeable judicial enlargement of a criminal statute applied retroactively, and hence the imposition of a criminal penalty for conduct,which, when committed, was not fairly stated to be criminal, did not occur to the petitioner herein. It was not necessary for the Supreme Court of Florida to read cannabis into the criminal proscriptions of Chapter 404, Florida Statutes, as it existed on January 11, 1972. The opinion of the court below in petitioner's cause did nothing more than affirm the obvious -- that Chapter 71-107, as it amended Chapter 404, Florida Statutes, to include cannabis within its criminal sanctions, was sufficiently definite to warn all those who might desire to deliver and possess cannabis that their conduct would

be proscribed. The Supreme Court of Florida did not affirm the petitioner's conviction by an unforeseeable judicial enlargement of Chapter 404, Florida Statutes, applied retroactively. The court merely affirmed his conviction by finding that the Florida Legislature had done exactly what they had intended to do by enacting Chapter 71-107, and that they had done it in terms that would give a person of ordinary intelligence fair notice that his delivery and possession of cannabis after July 1, 1971, would be forbidden by Chapter 404, Florida Statutes.

The principles of Bouie were not violated; indeed, those principles were not even slightly penetrated in the case sub judice.

CONCLUSION

The judgment of the Supreme Court of Florida in the case sought to be reviewed is in complete accord with the provisions of the Constitution of the United States raised herein as they are written and as they have been interpretated by this Court. The petition for writ of certiorari should be denied.

Respectfully submitted,

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PROOF OF SERVICE

This is to certify that three copies of the foregoing Brief of Respondent have been furnished petitioner's counsel, the Honorable Louis Ossinsky, Jr., OSSINSKY AND KROL, 411 Main Street, Post Office Drawer "E", Daytona Beach, Florida 32018, by U.S. Mail, this _____day of December, 1973.

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RESPONDENT'S
APPENDIX A

CHAPTER 404

FLORIDA DRUG ABUSE LAW

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404.13 Exceptions and exemptions not required to be negatived.
404.14 Notice of conviction to be sent to licensing board or officer.
404.15 Penalties.

404.001 Short title.—This chapter shall be cited and known as the "Florida Drug Abuse Law."

History.—§1, ch. 67-132.

404.01 Definitions.—For the purposes of this chapter:

(1) The words "barbiturate" or "barbiturates" mean each of the salts and derivatives of barbituric acid, also known as "malonylurea," and derivatives, compounds, mixtures or preparations thereof. "Barbiturate" or "barbiturates" include hypnotic and somnifacient drugs, whether or not derivatives of barbituric acid, except that this law shall not apply to narcotics, as now or hereafter defined by the Legislature of Florida, or bromides.

(2) The words "central nervous system stimulant" or "central nervous system stimulants" mean amphetamine, desoxyephedrine (methamphetamine), mephentermine, pipradol, phenmetrazine, methylphenidylacetate or any of the salts of any of the foregoing.

(3) The words "hallucinogenic drug" mean "lysergic acid" and "lysergic acid amide," "LSD" (lysergic acid diethylamide), "DMT" (dimethyltryptamine), "peyote," "mescaline," "psilocyn," "psilocybin," including their salts and derivatives, or any compounds, mixtures and every substance neither chemically nor physically distinguishable from them, and any and all derivatives of same and any other drug to which the drug abuse laws of the United States apply, and rivea corymbosa (ololiuqui) when used as a hallucinogen.

(4) The word "delivery" means selling, dispensing, giving away, leaving with or supplying in any other manner.

(5) The word "patient" means as the case may be:

(a) The individual medically requiring a barbiturate or a central nervous system stimulant, for whom a barbiturate or central nervous system stimulant or other drug controlled by this law is prescribed or to whom a barbiturate or a central nervous system stimulant or other drug controlled by this law is administered; or

(b) The owner or the agent of the owner of an animal medically requiring a barbiturate or a central nervous system stimulant or other drug controlled by this law for which such a drug is prescribed or to which such a drug is administered.

(6) The word "person" includes individual, corporation, partnership and association.

(7) The word "practitioner" means a person authorized by law to practice medicine, osteopathic medicine, dentistry, veterinary medicine or naturopathy in this state.

(8) The word "pharmacist" means a person authorized by law to practice pharmacy in this state.

(9) The word "prescription" means an order written or signed or transmitted by word of mouth, telephone or telegraph or other means of communication issued in good faith in the course of professional practice only, by a practitioner to a pharmacist for a barbiturate, a central nervous system stimulant or other drug controlled by this law, for a particular patient, which specifies the date of its issue, the name and address of such practitioner, the name and address of the patient (and, if such barbiturate or central nervous system stimulant or other drug controlled by this law is prescribed for an animal, the species of such animal), the name and quantity of such drug prescribed, the directions for the use of such drug. The record so made shall constitute the original prescription to be filled and preserved by the pharmacist.

(10) The word "manufacturer" means a person who manufactures barbiturates and central nervous system stimulants or any other drug controlled by this law and includes persons who prepare such drugs in dosage forms by mixing, compounding, encapsulating, entableting, packaging, repackaging or other process, but does not include a pharmacist who merely packages, prepares or compounds drugs to fill prescriptions received or to be received by him from a practitioner.

(11) The word "wholesaler" means a person engaged in the business of distributing barbiturates and central nervous system stimulants or other drug controlled by this law to persons included in any of the classes named in §404.04(2)(a)-(f).

(12) The word "cannabis" means all parts

of the plant cannabis sativa, L., whether growing or not; the seeds thereof; the resin extracted from any part of such plant; and every compound, manufacture, salt, derivative, mixture, or preparation of such plant, its seeds, or resin; but shall not include the mature stalks of such plant, fiber produced from such stalks, oil or cake made from the seeds of such plant, any other compound, manufacture, salt, derivative, mixture, or preparation of such mature stalks (except the resin extracted therefrom), fiber, oil, or cake, or the sterilized seed of such plant, which is incapable of germination.

Nothing in subsections (1), (2) and (3) of this section shall be construed to include items commonly known as patent or proprietary preparations which are sold as over-the-counter items not requiring a prescription.

History.—§1, ch. 57-384; §2, ch. 67-130; §1, ch. 71-107.

404.015 Legislative intent.—It is the intent of the legislature that all drugs controlled by the drug abuse laws of the United States, now or in the future, shall, in addition to the drugs specified by the laws of Florida, be controlled by the terms of this chapter.

History.—§1, ch. 70-44.

404.02 Prohibited acts.—The following shall be unlawful:

*(1) The delivering or causing to be delivered of any barbiturate or central nervous system stimulant or other drug controlled by this chapter, except as provided in §404.04, unless:

(a) Such barbiturate or central nervous system stimulant is delivered by a pharmacist in good faith, upon a prescription, or an authorized refill thereof, as hereinafter provided, and there is affixed to the original container in which such drug is delivered a label bearing:

1. The name and address of the establishment from which such drug was delivered;

2. The date on which the prescription for such drug was filled;

3. The number of such prescription as filed in the prescription files of the pharmacist who filled such prescription;

4. The name of the pharmacist and his license number;

5. The name of the practitioner who prescribed such drug;

6. The name of the patient, and if such drug was prescribed for an animal a statement showing the species of the animal; and

7. The directions for the use of the drug as contained in the prescription; or

(b) Such barbiturate or central nervous system stimulant is delivered or administered by a practitioner in good faith and in the course of professional practice only, and the original container in which such drug is delivered bears a label on which appears the date of delivery, the directions for use of such drug, the name of such practitioner, the name of the patient, and if such drug is prescribed for an animal a statement showing the species of the animal.

(c) A person to whom or for whose use any drug controlled under the authority of this chapter has been prescribed, sold or dispensed by a physician, dentist, apothecary and the owner of any animal for which any such drug has been prescribed, sold or dispensed by a veterinarian, possesses it only in the container in which it was delivered to him by the person selling or dispensing same.

(2) The refilling of any prescription for a barbiturate, central nervous system stimulant or other drug controlled by this chapter unless and to the limited extent designated on the prescription by the practitioner, or subsequently authorized by him.

(3) The delivery of a barbiturate or a central nervous system stimulant or hallucinogenic drug upon written prescription unless the pharmacist who filled such prescription files and retains it for a period of two years.

(4) The actual or constructive possession or control of a barbiturate, central nervous system stimulant, or other drug controlled by this chapter by any person unless such person obtained such drug on the written prescription of a practitioner or unless such person obtained such drug by direct delivery from a practitioner for bona fide medical use, and except as provided in §404.04.

(5) The actual or constructive possession or control of an hallucinogenic drug by any person, except as provided in §404.04.

(6) The refusal to make available and to afford full opportunity to check any record, file, stock or inventory, as required by §404.06.

(7) The failure to keep records, as required by §404.05.

(8) The using by any person to his own advantage, or the revealing of any information required under the authority of §404.06, concerning any method or process which, as a trade secret, is entitled to protection, except to law enforcement officers, or an officer or employee of the division of health of the department of health and rehabilitative services, or to a court when relevant in a judicial proceeding under this chapter.

(9) Obtaining or attempting to obtain a barbiturate or a central nervous system stimulant or hallucinogenic drug or procuring or attempting to procure the administration of a barbiturate or a central nervous system stimulant or hallucinogenic drug:

(a) By fraud, deceit, misrepresentation or subterfuge, or

(b) By the forgery or alteration of a prescription, or

(c) By the concealment of a material fact, or

(d) By the use of a false name or the giving of a false address.

(10) Making a false statement in any prescription, order, report, or record referred to in this chapter.

(11) Falsely assuming the title of or falsely representing any person to be a manufacturer, wholesaler, pharmacist, physician, den-

tist, veterinarian or other authorized person for the purpose of obtaining a barbiturate or a central nervous system stimulant or hallucinogenic drug.

(12) Making, issuing or uttering any false or forged prescription.

(13) Affixing any false or forged label to a package or receptacle containing a barbiturate or a central nervous system stimulant.

History.—§2, ch. 57-384; §2, ch. 67-136; §1, ch. 69-4; §1, ch. 69-1741; §§18, 38, ch. 69-106.

*Note.—Although §3, ch. 67-136 purported to amend subsection (1) in its entirety, it actually republished only the introductory paragraph and added new paragraph (c). Paragraphs (a) and (b) are included here on the assumption that no implied repeal was intended. They will be reenacted by a subsequent revisor's bill.

404.021 Arrest without warrant.—Notwithstanding any provision of the laws of this state relating to arrest to the contrary, a law enforcement officer may arrest without warrant any person whom he has probable cause to believe is violating the provisions of this chapter relating to possession of cannabis.

History.—§3, ch. 71-107.

404.04 Exemptions.—The provisions of §404.02 (1) and (4) shall not be applicable to:

(1) The delivery for medical or scientific purposes only of barbiturates or central nervous system stimulants to persons included in any of the classes hereinafter named, or to the agents or employees of such persons, for use in the usual course of their business or practice or in the performance of their official duties, as the case may be, or

(2) The actual or constructive possession or control of barbiturates or central nervous system stimulants or other drugs controlled by this law by such persons or their agents or employees for such employees for such use, to wit:

(a) Pharmacists.

(b) Practitioners.

(c) Persons who procure barbiturates or central nervous system stimulants for disposition in good faith and in the course of professional practice only, by or under the supervision of pharmacists or practitioners employed by them; or for the purpose of lawful research, teaching, or testing, and not for resale, including medical schools.

(d) Hospitals which procure barbiturates, central nervous system stimulants or other drugs controlled by this law for lawful administration by practitioners, but only for use by or in the particular hospital.

(e) Officers or employees of federal, state or local governments acting in their official capacity only, or informers acting under their jurisdiction.

(f) Registered manufacturers, wholesalers, carriers, and warehousemen.

History.—§4, ch. 57-384; §5, ch. 67-136.

404.041 Devices for injecting, smoking or using certain drugs; prohibition.—It is unlawful for any person to possess, have under his control, sell, or deliver any device, contrivance, instrument, or paraphernalia with the intent that said device, contrivance, instrument, or paraphernalia be used for unlawfully injecting, smoking, or using any drug controlled by this chapter.

History.—§1, ch. 69-370.

***404.05 Records.**—Persons designated in §404.04, except carriers, warehousemen, and officers acting in their official capacity, shall keep records of delivery and receipt of derivatives of barbituric acid, central nervous system stimulants, and hallucinogens, which may be dispensed only pursuant to a prescription, in the same manner as records of narcotic drugs are kept under the requirements of §398.10.

History.—§5, ch. 57-384; §6, ch. 67-136; §2, ch. 71-313.

*Note.—This section as amended takes effect January 1, 1972.

404.06 Inspection.—Prescriptions, files and records required by or under the authority of this chapter, and stocks of barbiturates and central nervous system stimulants, shall be open for inspection to officers and employees of the division of health of the department of health and rehabilitative services. No person having knowledge by virtue of his office of any such prescriptions, files or records shall divulge such knowledge, except in connection with a prosecution or proceeding in court, or before a licensing or registration board or officer, to which prosecution or proceeding the person to whom such prescriptions, files or records relate is a party.

History.—§6, ch. 57-384; §§18, 38, ch. 69-106.

404.07 Contraband.—All barbiturates, central nervous system stimulants, and hallucinogenic drugs, as herein defined, which may be handled, delivered, possessed, or distributed contrary to any provisions of this chapter are declared to be contraband and shall be subject to seizure and confiscation by any law enforcement officer of this state, or any political subdivision thereof, and by any officer or employee of the department of law enforcement.

History.—§7, ch. 57-384; §4, ch. 67-2007; §3, ch. 69-4; §§30, 38, ch. 69-106.

404.08 Seizure and forfeiture of vessel, vehicle, or aircraft illegally used.—

(1) Any vessel, vehicle, or aircraft which has been or is being used in violation of any provision of this chapter, or in, upon, or by means of which any violation of this chapter has taken or is taking place may be seized and forfeited, provided that no vessel, vehicle, or aircraft used by any person as a common carrier, in the transaction of business as such common carrier, shall be forfeited under the provisions of this chapter unless it shall appear that in the case of a railway car or engine, the owner, or in the case of any other such vessel, vehicle, or aircraft the owner or the master of such vessel, or the owner or conductor, driver, pilot, or other person in charge of such vehicle, or aircraft, was at the time of the alleged illegal act a consenting party thereto; provided

further that no vessel, vehicle, or aircraft shall be forfeited under the provisions of this chapter by reason of any act or omission established by the owner thereof to have been committed, or omitted, by any person other than such owner while such vessel, vehicle, or aircraft was unlawfully in the possession of a person who acquired possession thereof in violation of the criminal law of the United States, or of this state or any political subdivision thereof.

(2) Any law enforcement agency is empowered to authorize or designate officers, agents, or other persons to carry out the seizure provisions of this section. It shall be the duty of any officer, agent, or other person so authorized or designated, or authorized by law, whenever he shall discover any vessel, vehicle, or aircraft which has been or is being used in violation of any of the provisions of this chapter, or in, upon, or by means of which any violation of this chapter has taken or is taking place, to seize such vessel, vehicle, or aircraft and to place it in the custody of such person as may be authorized or designated for that purpose by the respective law enforcement agency, pursuant to these provisions.

History.—§3, ch. 57-304.

404.09 Procedure to have vessel, vehicle, or aircraft forfeited or sold.—

(1) The state attorney within whose jurisdiction the vessel, vehicle, or aircraft has been seized because of its use or attempted use in violation of any provision of this chapter shall proceed against the vessel, vehicle, or aircraft by rule to show cause in the circuit court having jurisdiction of the offense, and have it forfeited to the use of or the sale by the law enforcement agency making the seizure on producing due proof that the vehicle was being used in violation of the provisions of this chapter; provided that the provisions of this section shall not apply to innocent parties nor destroy any valid lien or retain title contract on vessels, aircraft or motor vehicles as defined by existing registration law and the notation of a lien upon the face of the certificate of title shall be deemed prima facie valid.

(2) Where it appears by affidavit that the residence of the owner of the vessel, vehicle, or aircraft is out of the state, or is unknown to the state attorney, the court shall appoint an attorney-at-law to represent the absent owner against whom the rule shall be tried contradictorily within ten days after its filing. This affidavit may be made by the state attorney or one of his assistants. The attorney so appointed may waive service and citation of the petition or rule, but shall not waive time nor any legal defense.

(3) Whenever the head of the law enforcement agency effecting the forfeiture deems it necessary or expedient to sell the property forfeited, rather than retain it to the use of the law enforcement agency, he shall cause an advertisement to be inserted in an official newspaper of the county where the seizure was made, and after ten days shall dispose of said property at public auction to the highest bidder for cash and without appraisal.

(4) The proceeds of all funds collected from any such sale shall be paid into the general fund of the county in which the seizure and sale was made.

History.—§9, ch. 57-304; (1) §1, ch. 69-139.

404.10 Rights of mortgagee or vendor.—The rights of any bona fide holder of a duly recorded mortgage, or duly recorded vendor's privilege, on the property seized under this chapter shall not be affected by the seizure.

History.—§10, ch. 57-304.

404.11 Injunctions.—The department of law enforcement shall have the right to institute an action in its own name to enjoin the violation of any of the provisions of this chapter. Said action for an injunction shall be in addition to any other action, proceeding, or remedy authorized by law.

History.—§11, ch. 57-304; §4, ch. 67-2207; §139, 36, ch. 69-106.

404.12 Rules and regulations.—The department of law enforcement shall, from time to time, adopt such rules and regulations as may be reasonably necessary to implement and carry out the purpose of this chapter.

History.—§12, ch. 57-304; §4, ch. 67-2207; §139, 36, ch. 69-106.

404.13 Exceptions and exemptions not required to be negatived.—In any complaint, information, or indictment, and in any action or proceeding brought for the enforcement of any provisions of this chapter, it shall not be necessary to negative any exception, excuse, proviso, or exemption contained in this chapter, and the burden of proof in any such exception, excuse, proviso, or exemption shall be upon the defendant.

History.—§13, ch. 57-304.

404.14 Notice of conviction to be sent to licensing board or officer.—On the conviction of any person of the violation of any provision of this chapter a copy of the judgment and sentence and of the opinion of the court, if any opinion be filed, shall be sent by the clerk of the court to the board or officer, if any, by whom the convicted defendant has been licensed or registered to practice his profession or to carry on his business. On the conviction of any such person the court may, in its discretion, recommend to the respective licensing board or officer the suspension or revocation of the registration or license of the convicted defendant to practice his profession or to carry on his business.

History.—§14, ch. 57-304.

404.15 Penalties.—Any person who violates any of the provisions of this chapter shall be punished as follows:

(1) For a first conviction he shall be guilty of a felony of the third degree, punishable as provided in §§775.082, 775.083, and 775.084; ex-

cept that if the first offense is the possession or delivery without consideration of not more than five grams of cannabis, he shall be guilty of a misdemeanor of the first degree, punishable as provided in §§775.082 and 775.083. For the purposes of this subsection, the word "cannabis" shall not include the resin extracted from the plant cannabis sativa, L., or any compound, manufacture, salt, derivative, mixture, or preparation of such resin.

(2) For a second or subsequent conviction, he shall be guilty of a felony of the second degree, punishable as provided in §775.082, §775.083, or §775.084.

(3) If the offense consisted of the delivery of any drug controlled by this chapter to a person who had not attained the age of twenty-one years at the time of such offense, the offender, upon conviction, shall be punished as follows:

(a) If the offender has no prior conviction for any offense under chapter 398 or chapter 404 at the time of the commission of the offense of delivery under this section, he shall be guilty of a felony of the second degree, punishable as provided in §775.082, §775.083, or §775.084.

(b) If the offender has been previously convicted of any offense under chapter 398 or chapter 404 at the time of the commission of the offense of delivery under this section, he shall be guilty of a felony of the first degree, punishable as provided in §775.082, §775.083, or §775.084; and the imposition of the sentence shall not be suspended or deferred, nor shall the person so convicted be placed on probation.

(4) The license to practice in Florida of any practitioner, as defined in §404.01(7), or any pharmacist, as defined by §404.01(8), who violates the provisions of this chapter shall, upon conviction, be automatically revoked.

*(5) Any person who violates the possession or constructive possession provisions of this chapter may, in the discretion of the trial judge, be required to participate in a drug rehabilitation program approved or regulated by the department of health and rehabilitative services pursuant to the provisions of chapter 397, provided the director of such program approves the placement of the defendant in such program. Such required participation may be imposed in addition to or in lieu of any penalty or probation otherwise prescribed by law, provided the total time of such penalty, probation, and program participation shall not exceed the maximum length of sentence possible for the offense.

History.—§15, ch. 57-384; §1, ch. 69-37; §2A, ch. 71-107; §352, ch. 71-136, 6 SC, ch. 71-222.

*Note.—Subsection (5) takes effect January 1, 1972.